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IN THE

Supreme Court of the United States

October Term, 1940

No. 442

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

EXPRESS PUBLISHING COMPANY, *Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE SINGER MANUFACTURING COMPANY, *AMICUS CURIAE*.

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BRIEF OF THE SINGER MANUFACTURING COMPANY, *AMICUS CURIAE*.

This brief is submitted on behalf of The Singer Manufacturing Company, a New Jersey corporation, *amicus curiae*, consent thereto having been obtained from both the Board and the respondent. It is submitted in relation only to the following issue, an issue not argued in respondent's brief: Respondent having been ordered to bargain collectively with the Guild, did the Court err in striking out subdivision (b) of paragraph 1 of the Board's order which ordered and directed respondent to cease and desist from:

> "(b) In any manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective

bargaining or other mutual aid and protection, as guaranteed in Section 7 of the Act." *

The Board states the issue with respect thereto, page 2 of its brief, as if the only question were whether a refusal to bargain collectively in violation of Section 8(5) of the Act constitutes a violation of Section 8(1) of the Act. We respectfully submit that from an affirmative answer to that question it does not follow, as the Board assumes, that a sweeping injunction to obey the law is necessary or proper.

The Board, in support of its sweeping injunction, argues every point except as to whether in the particular circumstances shown such a sweeping order is necessary or proper. The Board, for instance, argues (1) that a violation of Section 8(5) constitutes a violation of Section 8(1); (2) that the order that respondent cease and desist from in any manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed by Section 7 of the Act "is appropriate in form"; (3) that it has been determined in certain cases that the Board "may validly" impose a prohibition "substantially in the language of the statute," and (4) that this Court in another case involving entirely dissimilar circumstances sustained an order in such form. If, however, each one of these propositions be accepted as correct it does not follow that

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* The interest of The Singer Manufacturing Company in this question arises from the fact that a provision identical in form is incorporated in an order issued by the Board directing said Company to bargain collectively with the union designated therein and that such order is now before the United States Circuit Court of Appeals for the Seventh Circuit (No. 7509) upon petition by the Company asking that the same be set aside and upon the counter petition of the Board asking that it be enforced. Among other issues raised therein is the propriety of a provision in the form above set forth. If such order is sustained in the instant case it will constitute an embarrassing precedent.

it was error in the instant case to strike out the above provision.

We accept the proposition that an order in all instances need not be limited to the particular facts and circumstances disclosed by the record. We further accept the proposition that in certain instances a prohibition may be imposed "substantially in the language" of some portion of a statute.* We think, however, that such propositions must be read in the light of the rule that an order should not be broader than is reasonably necessary, under the circumstances disclosed, to prohibit in the future the unlawful acts shown or *other acts similar thereto* which would defeat the purposes of the Act and the order.

In *Standard Oil Co.* v. *United States*, 221 U. S. 1, this Court stated at page 77:

> "It may be conceded that ordinarily where it was found that acts had been done in violation of the statute, adequate measure of relief would result from restraining the doing of such acts in the future. Swift & Co. v. United States, 196 U. S. 375. But in a case like this, where the condition which has been brought about in violation of the statute, in and of itself is not only a continued attempt to monopolize, but also a monopolization, the duty to enforce the statute requires the application of *broader and more controlling remedies.*" (Italics ours.)

The above quoted proposition that *under certain circumstances* "broader and more controlling remedies" may

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* For example, an employer may be ordered to cease and desist from "dominating or interfering with the formation or administration" of a union (*N. L. R. B.* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261), or from "interfering with, influencing, intimidating, or coercing" employees with respect to their right of selecting or designating their representatives (*Texas & New Orleans R. Co.* v. *Brotherhood of Rwy. Clerks*, 281 U. S. 548).

be applied has been taken by the Board as a license to impose upon every employer a sweeping injunction to obey the law, regardless of what the circumstances may be in the particular case. The Board reaches this distorted conclusion (1) by ignoring the express statement in the *Standard Oil* case that "ordinarily" adequate measure of relief will result from restraining the doing of acts found to have been in violation of the statute; and (2) by failing to realize that "broader and more controlling remedies," where required by the circumstances, do not include a sweeping injunction to obey the law. The Board relies primarily upon *National Labor Relations Board* v *Swift & Co.*, 116 F. (2d) 143 (Adv. Op.) (C. C. A. 8); *National Labor Relations Board* v. *Fansteel Metallurgical Corporation*, 306 U. S. 240, 262; *Texas & New Orleans R. Co.* v. *Brotherhood of Rwy. Clerks*, 281 U. S. 548, 552, 567, 568, 571, and *Virginian Rwy. Co.* v. *System Federation No. 40*, 300 U. S. 515, 543-544.

Before considering these cases we wish to point out the very strong disapproval of this Court of orders constituting a sweeping injunction to obey the law. In *New York, New Haven & Hartford R. Co.* v. *Interstate Com. Com.*, 200 U. S. 361, Mr. Justice WHITE said at page 404:

> "The contention, therefore, is that, whenever a carrier has been adjudged to have violated the act to regulate commerce in any particular, it is the duty of the court, not only to enjoin the carrier from further like violations of the act, but to command it in general terms not to violate the act in the future in any particular. *In other words, the proposition is that, by the effect of a judgment against a carrier concern- a specific violation of the act, the carrier ceases to be under the protection of the law of the land, and must thereafter conduct all its business under the jeopardy of punishment for contempt for violating a general injunction. To state the proposition is, we think, to answer it. Swift & Co.* v. *United States*, 196 U. S.

375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276. The contention that the cited case is inapposite because it did not concern the act to regulate commerce, but involved a violation of the antitrust act, we think is also answered by the mere statement of the proposition. *The requirement of the act to regulate commerce, that a court shall enforce an observance of the statute against a carrier who has been adjudged to have violated its provisions, in no way gives countenance to the assumption that Congress intended that a court should issue an injunction of such a general character as would be violative of the most elementary principles of justice.* The injunction which was granted in the case of *Re Debs*, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900, was not open to such an objection, as its terms were no broader than the conspiracy which it was the purpose of the proceeding to restrain. *To accede to the doctrine relied upon would compel us, under the guise of protecting freedom of commerce, to announce a rule which would be destructive of the fundamental liberties of the citizen.*" (Italics ours.)

In *Swift & Co.* v. *United States*, 196 U. S. 375, Mr. Justice HOLMES, referring to a bill to restrain violations of Federal law against unlawful restraints and monopolies and an injunction entered thereon, said:

"The general objection is urged that the bill does not set forth sufficient definite or specific facts. This objection is serious, but it seems to us inherent in the nature of the case. The scheme alleged is so vast that it presents a new problem in pleading. If, as we must assume, the scheme is entertained, it is, of course, contrary to the very words of the statute. Its size makes the violation of the law more conspicuous, and yet the same thing makes it impossible to fasten the principal fact to a certain time and place. The elements, too, are so numerous and shifting, even the constituent parts alleged are, and from their

nature must be, so extensive in time and space, that something of the same impossibility applies to them. The law has been upheld, and therefore we are bound to enforce it notwithstanding these difficulties. *On the other hand, we equally are bound, by the first principles of justice, not to sanction a decree so vague as to put the whole conduct of the defendants' business at the peril of a summons for contempt. We cannot issue a general injunction against all possible breaches of the law.* We must steer between these opposite difficulties as best we can" (pp. 395-396). (Italics ours.)

* * * * * * * * * *

"* * * The general words of the injunction 'or by any other method or device, the purpose and effect of which is to restrain commerce as aforesaid,' should be stricken out. The defendants ought to be informed, as accurately as the case permits, what they are forbidden to do. Specific devices are mentioned in the bill, and they stand prohibited. *The words quoted are a sweeping injunction to obey the law, and are open to the objection which we stated at the beginning, that it was our duty to avoid"* (p. 401). (Italics ours.)

We do not believe that the fundamental principles of justice have changed in such short time as to warrant a sweeping injunction against a publisher of newspapers ordering it "to obey the law" on the sole basis that such publisher violated one specific subdivision of the National Labor Relations Act in one specific manner.

Respondent has been charged with one of the following alleged violations of Section 8(5) of the Act requiring it to bargain collectively:

(1) Failure to make counter proposals, or

(2) Failure to state the terms of an agreement that would be acceptable to it, or

(3) A predetermination not to enter into any contract.

Let us suppose for the purpose of argument that respondent believed that under the law it was not obligated to be willing to enter into any contract whatever and that the third or the more extreme be accepted as the position found to have been taken by it. Should it be a normal consequence thereof that from the time it is determined that such belief is not justified under the provisions of the Act respondent through eternity upon complaints of a union shall have heard and tried in contempt proceedings the propriety of every discharge of an employee, every change in an employee's salary or working conditions, every editorial it writes which may be construed as a reflection upon the union,* in fact every step that it may take in conjunction with the conduct of its business which directly or indirectly affects its employees? Is every mistake in judgment and every mistake in fact, however sincere, to be relieved from a jail sentence only at the mercy of the Court? Fundamental principles of justice have not been so changed that a single breach of a single provision of the Act permits one to be completely deprived of his normal right to have the propriety of his conduct determined in accord with the provisions of the Act and to have substituted therefor a continuing subjugation to contempt proceedings, fines and jail sentences for violations of an order "to obey the law." This Court, in *National Labor Relations Board* v. *Fansteel Metallurgical Corporation,* 306 U. S. 240, said at page 253

> "But reprehensible as was that conduct of the respondent, there is no ground for saying that it made respondent an outlaw or deprived it of its legal

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* The Board in many instances has held that the issuance of written statements can constitute intimidation and coercion and has specifically applied such proposition to editorials in newspapers instigated by an employer. *Matter of Stackpole Carbon Co. and U. E. R. W. Local No. 502,* 6 N. L. R. B. 171, 182-184.

rights to the possession and protection of its property."

Similarly we say that a violation of a single provision of the Act does not render one an outlaw and deprive him of his normal legal right to operate his business as may other citizens free from a general injunction directing him to obey the law.

It is of interest to note that the Board's brief does not contain one line of argument showing the *necessity* for its sweeping injunction. It contents itself with a legalistic argument by which it shows that a violation of Section 8(5) is a violation of Section 8(1) and therefore a violation of Section 7. Conceding the argument, it does not establish the *necessity* or *propriety* of the sweeping injunction to obey the law. We submit that the cases relied upon by the Board give no support to any contention that any such sweeping order is necessary or proper.

So far as we know, the specific issue here raised has been raised only in the case of *National Labor Relations Board* v. *Swift & Co.*, 108 F. (2d) 988 (C. C. A. 7), in which case the ruling was adverse to the contention of the Board. In that case the Court held that a prohibition against violation of Section 7, worded the same as that in the instant case, was unwarranted and struck it out. The Court, citing *Standard Oil Co.* v. *United States*, 221 U. S. 1, 77, 78, held that an order need not in all instances be limited to the particular facts and circumstances disclosed by the record and on the basis thereof sustained an order directing the employer to desist from dominating the union specified or "any other labor organization".

At the same time the Court struck out the provision prohibiting any violation of Section 7 of the Act, stating:

> "In our opinion the Board is not necessarily restricted in any case to an order which compels ces-

sation only of the particular and limited activity found to have taken place. As the remedy varies from case to case, so an order too broad in one case may be too narrow in another. In the last analysis of things, the propriety of an order depends on the facts of the case itself, and consideration is to be given to the complaint, the findings, and the character of the unlawful conduct—in short, consideration is to be given to all the facts and circumstances.

* * * * * * * *

"*Paragraph 1(b) of the order:* The Board was not warranted, however, in enjoining respondent from committing any act which might constitute a violation of Sec. 7 of the Act. In truth, the conduct enjoined has no fair relation to the issue which was heard and determined by the Board. The action of the Board in this respect was neither *necessary* nor *proper* under the facts and circumstances. The order is too broad." (p. 990.) (Italics ours.)*

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* In *Art Metals Const. Co.* v. *National Labor Relations Board*, 110 F. (2d) 148 (C. C. A. 2), the Court sustained the Board's form on the basis of the usual legalistic argument made that violation of Section 8(5) constitutes violation of Section 8(1). Not only was the propriety of the order under the circumstances not considered, but on the contrary the Court expressly said: "The petition does not challenge the generality of the language used in Article 1(b) of the order ('In any other manner,' etc.,) and for that reason we do not consider whether it should have been limited to the single unfair practice found." (p. 151.)

In *National Labor Relations Board* v. *Highland Park Mfg. Co.*, 110 F. (2d) 632, 639 (C. C. A. 4), and *National Labor Relations Board* v. *Swift & Co.*, 116 F. (2d) 143 (Adv. Op.) (C. C. A. 8), the form of the order was at issue and the Board's form was sustained. The issue, however, seems to have been determined, not on the basis of the *propriety* or *necessity* of a general injunction *under the circumstances shown*, but on the *assumption* that regardless of the propriety or necessity therefor under the circumstances shown the form is correct *as a matter of law*

(Footnote continued on page 10)

In *National Labor Relations Board* v. *Fansteel Metallurgical Corporation*, 306 U. S. 240, the respondent therein employed a labor spy; insisted that a bargaining committee should consist "only of employees of five years standing"; announced that it was its policy to refuse recognition "to outside unions"; refused to confer with a committee in which any "outside organizer had been included"; sought to have a "company union" set-up; required the president of the Union to work in a room adjoining the superintendent's office for the purpose of keeping him away from the other workers; refused to bargain with the Union (pp. 247-248).

In the course of its opinion this Court, under the heading, "*Sixth.—The requirement that respondent shall bargain collectively with Lodge 66 of the Amalgamated Association as the exclusive representative of the employees in the described unit*" (p. 261), held that under the circumstances disclosed respondent should not have been ordered to bargain collectively with Lodge 66. In the course of its discussion with reference thereto this Court said, at page 262, "The Board's order properly requires respondent to desist from interfering in any manner with its employees in the exercise of their right *to self-organization and to bargain collectively* through representatives of their own choosing" (Italics ours). It thereupon stated that certain provisions of the Board's order therein, including sub-

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(Footnote continued from page 9)
if a violation of Section 8(5) constitutes a violation of Section 8(1). The same may be said as to *National Labor Relations Board* v. *Biles Coleman L. Co.*, 98 F. (2d) 18, 22-23 (C. C. A. 9), except that it is not clear as to whether any issue was raised in regard to the form of the order.

In *National Labor Relations Board* v. *Griswold Mfg. Co.*, 106 F. (2d) 713, 715-716 (C. C. A. 3), and *Hartsell Mills Co.* v. *National Labor Relations Board*, 111 F. (2d) 291, 292 (C. C. A. 4), there apparently was no objection and no issue as to the form of the order.

division (a) of paragraph 1 thereof (identical in form with the provision considered in this brief) were sustained. We submit that the Court by so carefully delineating the acts which respondent was properly ordered to desist from committing completely negatives any thought that it was approving a clause constituting a sweeping injunction to obey the law. It is to be noted (1) that the nature of the activities of the respondent required a rather broad order to cease and desist from "interfering" with the right of the employees "to self-organization," and (2) the respondent therein did not raise the question as to whether the form of the prohibition was broader than warranted. The decision therefore certainly does not stand for the proposition that a general injunction to obey the law is proper in every case in which any single violation of the law may have been found.

In *Texas & New Orleans R. Co.* v. *Brotherhood of Ry. Clerks;* 281 U. S. 548, the injunction sustained was not a sweeping injunction to obey the law. The injunction restrained the Railway Company from interfering with, influencing, intimidating or coercing the Union or the Company's employees. It was directed at acts of intimidation that had been engaged in by the Railway. The very pages of this decision cited by the Board show such to be the fact and show that this Court analyzed the words "interference," "coercion" and "influence" and held that they were *definite and explicit enough to show the nature of the conduct prohibited by the injunction* (pp. 567-568).

So, too, in *Virginian Rwy. Co.* v. *System Federation No. 40,* 300 U. S. 515, the injunction was directed at specific acts. It restrained coercion and intimidation and directed the Railway Company to treat with the representatives of its employees. It was not a sweeping injunction to obey the law (pp. 540-541).

Under the circumstances shown by the record in this case, whether the ultimate order be limited to one directing respondent "to bargain collectively" or whether it be accompanied by a negative provision directing respondent "to cease and desist from refusing to bargain collectively," we submit that such order will constitute a sufficiently, if not an excessively,* "broad and controlling remedy" to secure the performance of the acts desired.

In connection therewith we believe it pertinent to point out that if a general injunction to obey the law be embodied in the order herein there indeed will be an anomalous result. The Board's allegation and finding that respondent intimidated and coerced its employees by the reading of a statement stand reversed and the complaint and order with respect thereto dismissed and vacated. Yet notwithstanding respondent's complete vindication with respect thereto, the proposed sweeping order will leave it in no better position than if the allegation, finding and order had been sustained.

In conclusion, we repeat that we recognize that in certain cases it is proper not only to restrain the precise acts committed but in addition thereto to restrain any other acts similar thereto, and that in certain cases in order to restrain such other similar acts it may be proper to word the prohibition in the language of the statute. We, however, sub-

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* It is our contention that under certain circumstances an order "to bargain collectively," when applied to complex facts, situations, proposals and counter proposals arising from prolonged negotiations with respect to the substantive terms of a contract, such as were involved in *National Labor Relations Board* v. *The Singer Manufacturing Company*, 24 N. L. R. B. No. 41 (June 6, 1940), may be so vague and indefinite as to render such an order invalid. Such question, however, is not involved on the facts disclosed and if it were involved would not be open on the record herein.

mit that such principles cannot be used as an excuse to get into every order issued by the Board a blanket injunction directing the employer to obey the law. Such a blanket injunction contravenes not only the controlling decisions but contravenes the express provisions of a Federal statute. Section 383 of Title 28 U. S. C. A. provides:

> "Every order of injunction or restraining order * * * shall be specific in terms, and shall describe in reasonable detail * * * the act or acts sought to be restrained."

The Court did not err in striking from the order subdivision (b) of paragraph 1 thereof.

Respectfully submitted,

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APPENDIX.

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449; 29 U. S. C., Supp. V, Sec. 151 *et seq.*) are as follows:

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 6(a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective bargaining unit covered by such agreement when made.

(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

* * * * * * * *

SEC. 10. (c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

* * * * * * * *

(e) * * * Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

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SUPREME COURT OF THE UNITED STATES.

No. 442.—October Term, 1940.

National Labor Relations Board, Petitioner, *vs.* Express Publishing Company. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[March 3, 1941.]

Mr. Justice Stone delivered the opinion of the Court.

The National Labor Relations Board ordered respondent affirmatively to bargain collectively with the San Antonio Newspaper Guild, the authorized representative of respondent's employees. In addition it ordered respondent, (1) to "cease and desist" from refusing to bargain collectively with the Guild; (2) to "cease and desist" from interfering with, restraining or coercing its employees in the exercise of their rights to self-organization", and other rights guaranteed by § 7 of the National Labor Relations Act, 49 Stat. 449; 29 U. S. C. Supp. V, § 151, *et seq.;* (3) to post notices stating, among other things, that respondent will "cease and desist as aforesaid" and will bargain collectively with the organized representative of its employees. On the record before us the question for our decision is whether the provisions of the order which we have enumerated are supported by the Board's finding that the respondent had refused to bargain collectively with the authorized representative of its employees, and had interfered with such bargaining negotiation, and had thereby interfered with the exercise of the rights guaranteed by § 7 of the Act.

The Board issued its complaint charging respondent, a publisher of a newspaper, with refusal to bargain collectively with the Guild as the authorized representative of the employees in respondent's editorial department, and that by such refusal and by statements made by respondent at a meeting of those employees it "did interfere with, restrain and coerce" its employees in the exercise of the rights guaranteed by § 7 of the Act[1] and did engage in unfair labor

[1] The statements alleged to have been made by officers or agents of respondent were "Existing independent employment relations may be continued by the individual employees or by employees as a group". "No one can compel you to join any organization". And referring to respondent's treatment of its employees, it was alleged that respondent's officer stated: "Each of you know we were not forced to do this by any labor organization and no labor organization can force us to do these things".

practices defined by §§ 8(1) and 8(5). The usual proceedings and hearings before the Board resulted in findings by the Board to the effect that although respondent had throughout recognized the organization of respondent's editorial room employees and the Guild as their representative, and had met with the Guild representatives whenever requested for the purpose of discussing the employees' demands, it nevertheless had persistently refused to discuss in detail the proposals of the Guild, to make any counter proposals or to enter into any agreement with it, and had not negotiated in good faith in a genuine effort to compose the differences between employer and employees.

The Board found that respondent had refused to bargain as required by § 8(5) of the Act. It found that respondent had made the statements charged in the complaint at a meeting of its employees and that these statements were an "interference with the Guild's efforts to negotiate". Treating respondent's action in refusing to bargain and in interfering with the bargaining negotiations as an infringement of all the rights guaranteed to the employees by the Act, it found broadly, in the words of the statute, a violation of § 8(1) which declares that it is an unfair labor practice for the employer "to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in § 7". Section 7 provides: "Employees shall have the right of self-organization to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."

From all this the Board concluded that the "appropriate remedy" was an order directing respondent "upon request to bargain collectively with the . . . Guild" as the "exclusive representative" of respondent's editorial room employees and "if understandings are reached to embody such understandings in a signed agreement if requested to do so by the Guild." Having provided the recommended remedy by the provisions of its order directing the respondent to bargain and to cease and desist from refusing to bargain the Board went further and ordered broadly that respondent should in effect refrain from violating the Act in any manner whatsoever. This it did by paragraph 1(b) of the order which directed respondent to cease and desist from

"In any manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to

form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid and protection, as guaranteed in Section 7 of the Act."

It is this and the provisions of the order other than that part of it directing respondent to bargain which are the subjects of the present controversy.

Upon petition of the Board to enforce the order, the Court of Appeals for the Fifth Circuit struck from it all the provisions except that which directed respondent to bargain with the Guild on request, and to embody any understanding in a signed agreement. For so much of the order as directed the posting of notices the court substituted a requirement that respondent notify the Guild of its willingness to comply with the order as modified and to notify a specified agent of the Board what steps respondent had taken to comply with the order. 111 F. (2d) 588. We granted certiorari November 12, 1940, the questions raised being of importance in the administration of the National Labor Relations Act.

Although respondent has not sought certiorari it seeks to retain such advantages as it may have gained from the modification of the Board's order below, by arguing broadly that the Board's finding of respondent's refusal to bargain is without support in the evidence, which it is said shows only that respondent refused to yield to the Guild demands as it was free to do. But in the absence of a cross-petition for certiorari by respondent that question is not open here. Without the findings relating to respondent's refusal to bargain there was no basis for any order by the Board and we think that the purpose and effect of the judgment sustaining so much of the Board's order as directed that respondent bargain with the Guild was to sustain the findings on which it was based. This appears both from the opinion of the Court of Appeals, the purport of which is that respondent in its negotiations with the Guild had not acted in good faith and so had failed to bargain as the statute requires, and also from the terms of the judgment modifying the Board's order. The judgment affirming the Board's order as modified retained, as the foundation of the judgment, the recital contained in the Board's original order that it was made upon the basis of all the Board's findings. In this state of the record our review is limited to the sufficiency of the Board's findings to support the order.

We conclude also that it is not open to respondent to challenge the judgment below, as it attempts to do, on the ground that the Board's complaint in charging a failure to bargain did not sufficiently inform respondent of the contention that it had failed to bargain in good faith. This is the case both because respondent has sought no review of the judgment below and because it sufficiently appears from the record that in the course of the hearings before the Board respondent was fully advised of the nature of the Board's contention.

But it is the Board which has brought the judgment below here for review and on it rests the burden of showing in what respects the judgment is erroneous. Cf. *Federal Trade Commission* v. *Beech-Nut Co.*, 257 U. S. 441. To sustain that burden the Board insists that all the provisions of its order were lawfully made and that it is entitled to have the order enforced in its entirety. Section 10(c) of the Act provides that if the Board "upon all the testimony taken" "shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice then the Board shall state its findings of fact and shall issue and cause to be served on such persons an order requiring such person to cease and desist from such unfair labor practice and to take such affirmative action . . . as will effectuate the policies of this Act." The Board, having found in this case that respondent had refused to bargain, that part of its order directing respondent to "cease and desist from refusing to bargain collectively" with the Guild, was in exact compliance with the statute and should have been left undisturbed by the judgment below.

A question of a different nature is presented by Paragraph 1(b) of the order by which the Board, on the basis of respondent's action in refusing to bargain and its statements interfering with the bargaining negotiations, has directed respondent not to violate "in any manner" the duties imposed on the employer by the statute. Petitioner argues that since respondent's refusal to bargain, which is a violation of § 8(5), is also a violation of § 8(1) which in terms incorporates by reference all the rights enumerated in § 7, the Board is not only free to restrain violations like those which respondent has committed, but any other unfair labor practices of any kind which likewise infringe any of the rights enumerated in § 7, however unrelated those practices may be to the acts

of respondent which alone emerged in course of the hearing and which the Board has found.

But we think it does not follow that, because the acts of respondent which the Board has found to be an unfair labor practice defined by § 8(5) is also a technical violation of § 8(1), the Board, in the circumstances of this case, is justified in making a blanket order restraining the employer from committing any act in violation of the statute, however unrelated it may be to those charged and found, or that courts are required for the indefinite future to give effect in contemp. proceedings to an order of such breadth.

We cannot find such authority or requirement in the carefully chosen language of § 10(c), which directs the Board to state its findings of fact showing the unfair labor practice charged and to order the person accused to "cease and desist from such unfair labor practice", or in § 10(e) of the Act which authorizes the court on application of the Board to enter a "decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board." It is obvious that the order of the Board, which when judicially confirmed, the courts may be called on to enforce by contempt proceedings, must, like the injunction order of a court, state with reasonable specificity the acts which the respondent is to do or refrain from doing. It would seem equally clear that the authority conferred on the Board to restrain the practice which it has found the employer to have committed is not an authority to restrain generally all other unlawful practices which it has neither found to have been pursued nor persuasively to be related to the proven unlawful conduct.

Congress has itself afforded a guide pointing to the appropriate limits of the order which the Board is to make in restraining unfair labor practices. By its definition and classification of unfair labor practices in the statute it has shown that they are not always so similar or related that the commission of one necessarily merits or rightly admits of an order restraining all. Here the whole controversy between respondent and the Guild was with respect to the Guild's requests) bargain and respondent's attempt to influence the negotiations and its ultimate refusal to enter into an agreement from all of which the Board inferred the refusal to bargain in good faith. In all other respects respondent has consistently left the Guild and its activities undisturbed. The Board

made no finding and there is nothing in the record to suggest that the failure of the bargaining negotiations and all that attended them gave any indication that in the future respondent would engage in all or any of the numerous other unfair labor practices defined by the Act.

Refusal to bargain, defined as an unfair labor practice by § 8(5), may be, as we think it was here, wholly unrelated to the domination of a labor union or the interference with its formation or administration or financial or other support to it, all of which are defined as unfair labor practices by § 8(2). Refusal to bargain may be, as we think it was here, wholly unrelated to "discrimination in regard to the hire or tenure of employment of any term or condition of employment to encourage or discourage membership in any labor organization," all of which are unfair labor practices as defined by §8(3). Here the Board made no finding, based either on the specific circumstances disclosed by the record or on its own expert judgment of their relation to the policy embodied in § 7, or as to any relationship or probable relationship of respondent's refusal to bargain and the other types of unfair practices some of which are enumerated in § 8. Yet, if the contention which it makes is to be sustained subsequent violations of § 8(2) and (3), which are also violations of § 8(1) may be the subject of a contempt order merely because respondent by the refusal to bargain has violated § 8(5) which is similarly a violation of § 8(1).

In view of the authority given to the Board by § 10(c), carefully restricted to the restraint of such unfair labor practices as the Board has found the employer to have committed, and of the broad language of § 10(e) authorizing the courts to modify the order of the Board wholly or in part, we can hardly suppose that Congress intended that the Board should make or the court should enforce orders which could not appropriately be made in judicial proceedings. This is the more so because § 10(a), which authorizes the Board "as hereinafter provided to prevent any person from engaging in any unfair labor practice", specifically directs that "This power shall be exclusive and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law or otherwise". In the light of these provisions we think that Congress did not contemplate that the courts should, by contempt proceedings, try alleged violations of the National Labor Relations Act not in controversy and not

found by the Board and which are not similar or fairly related to the unfair labor practice which the Board has found.

A federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future unless enjoined, may fairly be anticipated from the defendant's conduct in the past. But the mere fact that a court has found that a defendant has committed an act in violation of a statute does not justify an injunction broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged. This Court will strike from an injunction decree restraints upon the commission of unlawful acts which are thus dissociated from those which a defendant has committed. *Swift & Co.* v. *United States*, 196 U. S. 375; *New York, New Haven & Hartford R. Co.* v. *Interstate Commerce Commission*, 200 U. S. 361, 404, and see under the National Labor Relations Act, *National Labor Relations Board* v. *Swift & Co.*, 108 F. (2d) 988.

It is a salutary principle that when one has been found to have committed acts in violation of a law he may be restrained from committing other related unlawful acts. But we think that without sacrifice of that principle, the National Labor Relations Act does not contemplate that an employer who has unlawfully refused to bargain with his employees shall for the indefinite future, conduct his labor relations at the peril of a summons for contempt on the Board's allegation, for example, that he has discriminated against a labor union in the discharge of an employee, or because his supervisory employees have advised other employees not to join a union. See e.g., *H. J. Heinz Co.* v. *National Labor Relations Board*, No. 73, decided January 6, 1941.

Having found the acts which constitute the unfair labor practice the Board is free to restrain the practice and other like or related unlawful acts. But as the Court has held in the case of the Federal Trade Commission, see *Federal Trade Commission* v. *Beech-Nut Co.*, *supra*, 455, an order not so related should be appropriately restricted on review. The breadth of the order, like the injunction of a court, must depend upon the circumstances of each case, the purpose being to prevent violations, the threat of which in the future is indicated because of their similarity or relation to those unlawful acts which the Board has found to have been committed by the employer in the past. See *United States* v. *Trans-Missouri Freight*

Association, 166 U. S. 290, 308, 309; *Standard Oil Co.* v. *United States*, 221 U. S. 1, 77; *Texas & New Orleans R. R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548; *Local 167* v. *United States*, 291 U. S. 293; *Virginian Railway Co.* v. *System Federation No. 40*, 300 U. S. 515, 541, 543, 544. We hold only that the National Labor Relations Act does not give the Board an authority, which courts cannot rightly exercise, to enjoin violations of all the provisions of the statute merely because the violation of one has been found. To justify an order restraining other violations it must appear that they bear some resemblance to that which the employer has committed or that danger of their commission in the future is to be anticipated from the course of his conduct in the past. That justification is lacking here. To require it is no more onerous or embarrassing to the Board than to a court. And since we are in a field where subtleties of conduct may play no small part, it is appropriate to add that an order of the Board, like the injunction of a court, is not to be evaded by indirections or formal observances which in fact defy it. After an order to bargain collectively in good faith, for example, discriminatory discharge of union members may so affect the bargaining process as to establish a violation of the order.

The Board places strong reliance on *National Labor Relations Board* v. *Fansteel Metallurgical Corporation*, 306 U. S. 240, and on *Texas & New Orleans Railroad Co.* v. *Brotherhood of Railway Clerks*, *supra*, 555, 567, 568, 571, and *Virginian Railway Co.* v. *System Federation No. 40*, *supra*, 543, 544. In those cases the cease and desist order and the injunctions were substantially like paragraph 1(b) of the Board's order in the present case. But in them the unfair labor practices did not appear to be isolated acts in violation of the right of self-organization, like the refusal to bargain here, but the record disclosed persistent attempts by varying methods to interfere with the right of self-organization in circumstances from which the Board or the court found or could have found the threat of continuing and varying efforts to attain the same end in the future.

An appropriate order in the circumstances of the present case would go no further than to restrain respondent from any refusal to bargain and from any other acts in any manner interfering with the Guild's efforts to negotiate. So far as respondent's past conduct may be thought to have had any effect on the rights guaranteed by § 7, such consequences would be effectively prevented by the pro-

hibition of such an order without drawing it so broadly as to forbid all other unrelated unfair labor practices.

Only a word need be said of that part of the Board's order requiring the posting of notices. We have often held that the posting of notices advising the employees of the Board's order and announcing the readiness of the employer to obey it is within the authority conferred on the Board by § 10(c) of the Act "to take such affirmative action . . . as will effectuate the policies" of the Act. See *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261, 268; *H. J. Heinz Co.* v. *National Labor Relations Board*, *supra*.

But respondent argues that the authority of the Board does not extend to the requirement, such as was made in this case, that the employer confess violation of the Act by a published announcement that he will "cease and desist" from violating it. See, *National Labor Relations Board* v. *Abell Co.*, 97 F. (2d) 951; *Burlington Co.* v. *National Labor Relations Board*, 104 F. (2d) 736; *Swift & Co.* v. *National Labor Relations Board*, 106 F. (2d) 87; *Art Metals Construction Co.* v. *National Labor Relations Board*, 110 F. (2d) 148, 151, 152; *Hartsell Mills Co.* v. *National Labor Relations Board*, 111 F. (2d) 291, 293. Since the Board has changed its practice and now provides in all orders that the employers' notices shall state "that he will not engage in the conduct from which he is ordered to cease and desist" it consents that the present order be modified accordingly.

What we have said requires a reversal of the judgment below and the reestablishment of the Board's order with the following exceptions:

Paragraph 1(b) of the order will be modified so as to require only that respondent shall cease and desist from

"In any manner interfering with the efforts of the Guild to bargain collectively with Express Publishing Company, San Antonio, Texas".

Paragraph 2(b) of the order will be modified by striking from it the words:

"will cease and desist as aforesaid"

and substituting for them the words

"will not engage in the conduct from which it is ordered to cease and desist as aforesaid."

It is so ordered.

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SUPREME COURT OF THE UNITED STATES.

No. 442.—October Term, 1940.

National Labor Relations Board, Petitioner, *vs.* Express Publishing Company. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[March 3, 1941.]

Mr. Justice Douglas.

I think the cease and desist order should be enforced in full.

Respondent did not object in its answer to the Board's petition before the Circuit Court of Appeals to that portion of the Board's order which the Court now modifies. So far as the briefs disclose it did not make any such objection in the Circuit Court of Appeals. Nor did respondent question the propriety of that provision of the order or challenge the power of the Board to make it either in its brief or in its oral argument here. Any controversy on that issue before this Court is therefore not attributable to respondent. For on the record before us it must be assumed that respondent wholly acquiesces in that phase of the Board's action. In that posture of the case, it is plain this this Court will not customarily raise *sua sponte* objections which respondent did not choose to make. We are, of course, asked to enforce an order of the Board. And I suppose we might refuse to enforce provisions of such an order which are patently *ultra vires*, even though the other party raises no objection but acquiesces in them. But, in my view, this provision of the order is not beyond the power of the Board.

The order as modified restrains respondent from interfering in any manner "with the efforts of the Guild to bargain collectively" with it. But respondent is not restrained from interfering with the employees in the exercise of their rights (a) to self-organization, (b) to form, join, or assist labor organizations, or (c) to engage in concerted activities for the purposes of collective bargaining or other mutual aid and protection. These deletions represent the loss of substantial sanctions—sanctions which the expert administrative

agency may well have concluded are basic and essential for protection of the right which this very union has won.

Take the case where an employer is playing ducks and drakes with the National Labor Relations Act. He pays mere lip service to the requirements of the Act while intent on blocking in his plant any effective union action. If that is a faithful representation of his attitude, the mandate of the Act might be wholly frustrated or its enforcement needlessly delayed were the Board merely to order him to cease and desist from interfering "with the efforts" of the union "to bargain collectively". That, without more, might well be wholly ineffective, or so the Board in its discretion might conclude. In fact, it might even be an open invitation to an employer intent on evasion of the spirit and letter of the Act to resort to devious routes to the same end. Employees are dropped—perhaps the leaders of the union; labor spies are employed; a company union is sponsored and financed; new employees are selected who promise not to join the outside union. The purpose is to thwart any effective action by that union. Such obstructive tactics could go on apace and yet no "efforts" of the union "to bargain collectively" need be denied. The employer could continue the so-called negotiations with the union, perhaps reach at least a tentative agreement with it, and yet in a myriad of ways undermine it if the breadth of the cease and desist order were delimited.

Perhaps this is to conjure up remote and hypothetical situations. Perhaps that is not this case.[1] But I think it is important to remind that we do not sit as an administrative agency with discretion to adjust the remedies accorded by the Act to what we think are the needs of particular cases, with power to write or rewrite administrative orders in light of what we think are the exigencies of specific situations, with the duty to pass on the wisdom of administrative policies. Congress has invested the Board, not us, with discretion to choose and select the remedies necessary or appropriate for the evil at hand.

The Board concluded (so we must presume) that its order directing respondent to bargain collectively with the Guild need be

[1] It should, however, be noted that the Board concluded that "the respondent had no intention of negotiating in good faith with the Guild nor of entering into a collective bargaining agreement with it." And the Circuit Court of Appeals observed, " . . . we think there was evidence to support the finding of the Board that respondent had determined in advance never to agree to anything."

buttressed by broad protective provisions good against any and all methods of evasion. Formal recitals could hardly make that plainer than it is.[2] And clearly those provisions are no broader than the wide reaches of the controversy disclosed in this record.

Whether the remedy chosen by the Board was reasonably necessary in this case is not for us to determine. Nor is it for us to say what language is adequate to safeguard the labor rights which are in issue. To cut down the language of this order not only substitutes our judgment for that of the Board; it will also result in the creation of a host of uncertainties. The original order makes clear that any attempted evasion, no matter how devious, is banned. As modified the order clearly subtracts from those sanctions. But the precise extent of its dilution remains uncertain. The Board may, of course, in case of future violations institute new administrative proceedings. Yet the method here chosen for settlement of this labor controversy does not promise peace. It invites a prolongation of the dispute which should be deemed to have been settled, with the employer's acquiescence, once and for all. That practical aspect of the matter is of great importance on the merits; and it also emphasizes the seriousness of our intrusion into the administrative domain. See Note (1940) 53 Harv. L. Rev. 472.

Mr. Justice BLACK and Mr. Justice REED join in this opinion.

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[2] In this connection it should be observed that the Board found that respondent had "interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act" by reading to them a statement which "presented a distorted concept" of the employees' rights under the Act. The Circuit Court of Appeals set aside that finding. While the Board did not raise that issue in its petition for certiorari, that episode is nevertheless relevant to the scope of the cease and desist order. If it be assumed, as does the majority, that such a broad order must be founded at least on some evidence that other related unlawful acts "may fairly be anticipated from the defendant's conduct in the past", that episode is of significance. For though it might not of itself support an additional finding of a separate violation of § 8, it certainly is some evidence for the exercise of the Board's expert judgment that the refusal to bargain did not have an improbable relationship to other likely obstructive tactics of a related order.